1989

Diehl Lumber Transportation Inc v. Glenn J. Mickelson dba Glenn's Service Company : Brief of Respondent

Utah Court of Appeals

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890179-CA

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IN THE UTAH COURT OF APPEALS

DIEHL LUMBER TRANSPORATION, INC., Plaintiff and Appellant, vs. GLENN J. MICKELSON dba GLENN'S SERVICE COMPANY, Defendant and Respondent.	BRIEF OF RESPONDENT
GLENN J. MICKELSON dba GLENN'S SERVICE COMPANY, Third-Party Plaintiff, vs. HERITAGE CORPORATION, a Utah corporation, COMTEL, a Utah corporation, AMERICAN WEST MORTGAGE CORPORATION, a Utah corporation, and FAR WEST SAVINGS & LOAN, Third-Party Defendants, and ZIONS FIRST NATIONAL BANK, Third-Party Defendant and Appellant.	Case No. 890179-CA

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APPEAL FROM JUDGMENT, THIRD DISTRICT COURT
SALT LAKE COUNTY, HONRABLE JAMES S. SAWAYA

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STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This case involves a civil action whereby a licensed electrical contractor, Glenn J. Mickelson dba Glen's Service Company (MICKELSON) brought suit in the District Court of Salt Lake County, to recover on alternative theories of replevin and lien foreclosure, for labor and materials provided by MICKELSON in the construction of a commercial building, (the COMTEL BUILDING). After trial before the Honorable James S. Sawaya, judgment was granted in favor of the Respondent, MICKELSON, awarding the foreclosure of his mechanics lien against said real property, (COMTEL BUILDING), determining that the Respondent's mechanics lien is superior to the claims of Zions First National Bank (ZIONS) and Diehl Lumber and Transporation, Inc. (DIEHL).

ZIONS appealed to the Utah Supreme Court and pursuant to §78-2a-3(j) the case was transferred to the Court of Appeals from the Supreme Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Per Rule 24(b) of the Rules of the Utah Court of Appeals, the Appellant's issues raised are not made.

RELEVANT STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

U.C.A. §38-1-11 (1987):

> 38-1-11. Enforcement - Time for - Lis Pendens - Action for debt not affected.
>
> Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days. Within the twelve months herein mentioned the lien claimant shall file for record

with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action, and the burden of proof shall be upon the lien claimant and those claiming under him to show such actual knowledge. Nothing herein contained shall be construed to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.

U.C.A. §38-1-7(2)(e):

(2) This notice shall contain a statement setting forth the following information:

...

(e) the signature of the lien claimant or his authorized agent, and the date signed.

U.C.A. §38-1-3:

38-1-3. Those entitled to lien - What may be attached.

Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designes, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise. This lien shall attach only to such interest as the owner may have in the property.

U.R.C.P. Rule 14

Rule 14. Third-party practice.

(a) When defendant may bring in third party. At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he filed the third-party complaint not later than ten days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When plaintiff may bring in third party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitled a defendant to do so.

U.R.C.P. Rule 52(a)

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injuctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Request for findings are not necessary

for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

U.R.C.P. Rule 60(a)

(a) Clerical mistakes. Clerical mistakes in judgment, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Article 1, Sec. 7, Utah Consitution:

No person shall be deprived of life, liberty or property, without due process of law.

Fourteenth Amendment, United States Constitution:

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action involves the determination of whether the Respondent, MICKELSON, an electrical subcontractor, is entitled to foreclose a mechanics lien against real property purchased by DIEHL from ZIONS First National Bank who acquired its interest through a trustee's sale by the construction lender.

1. This action involves generally the construction of a commercial building located at 57 West Vine Street, Murray, Utah, herein referred to as the "COMTEL BUILDING". (Findings of Fact 1, Record 580.)

2. The building was constructed by Heritage Corporation (HERITAGE) as owner and general contractor, for and on behalf of Comtel, Inc., the Lessee of the premises for whom the building was being constructed. (Findings of Fact 2, Record 580.)

3. The construction financing was obtained by HERITAGE from American West Mortgage Corporation whose trust deed was recorded on March 29, 1985, and subsequently assigned to Far West Savings and Loan. (Findings of Fact 3, Record 580.)

4. The Respondent, MICKELSON, was hired by HERITAGE to provide electrical materials, labor and equipment (in the construction of the COMTEL BUILDING) pursuant to a written subcontract with HERITAGE. (Findings of Fact 5, Record 580.)

5. MICKELSON provided labor, materials, and equipment for the contruction and improvement of the COMTEL BUILDING from August 15, 1985, until June 10, 1986, at which time work was suspended by MICKELSON, based upon the fact that the Owner/General Contractor (HERITAGE) had failed to make payment of

the obligations due and owing. (Findings of Fact 6, Record 580.)

6. That at the time of suspension of work on June 10, 1986, there remained due and owing to MICKELSON the sum of $27,026.46. (Findings of Fact 7, Record 580.)

7. That on or about the 3rd day of June, 1986, the said mortgage lender, Far West Savings and Loan, filed its "Notice of Default and Election of Sale". (Findings of Fact 8, Record 581.)

8. That on August 21, 1986, MICKELSON filed for record, his Notice of Lien. (Findings of Fact 9, Record 581.)

9. On September 5, 1986, Far West Savings and Loan gave Notice of Trustee's Sale, scheduling the sale of the property for October 7, 1986. (Findings of Fact 10, Record 581.)

10. On October 8, 1986, at Trustee's Sale, Zions First National Bank (ZIONS) purchased the interest of Far West Savings and Loan. (Findings of Fact 11, Record 581.)

11. On October 27, 1986, DIEHL purchased the property (COMTEL BUILDING) from ZIONS, and thereby DIEHL claims to be the owner of the property (COMTEL BUILDING). (Findings of Fact 12, Record 581.)

12. The construction of the COMTEL BUILDING was basically completed on July 17, 1986, except as to the work suspended for failure to pay. (Findings of Fact 13, Record 581.)

13. Prior to the filing of the construction lender's (American West/Far West) trust deed on March 27, 1985, several subcontractors did work on the property. (Record 580.)

14. In November 1984, the architect completed the "design development plot plans, floor plans, elevations and presentation

drawings". (Findings of Fact 14, Record 581.)

15. Prior to January 16, 1985, DeMoss & Associates completed the boundary survey of the property and rough staking of the site for the building so that the leveling and excavation of the building site could be done by Bay Construction. (Findings of Fact 15, Record 581.)

16. In January 1985, Bay Construction, pursuant to his agreement with HERITAGE, brought on to the project a large D-8 Cat, with which he excavated and graded a "level platform" the approximate size of the building to rough grade, billing approximately $2,000.00 for his work completed. (Findings of Fact 17 and 18, Record 582.)

17. HERITAGE intended the work to be the commencement of construction of the job. (Findings of Fact 19, Record 582.)

18. On the date the construction lender (American West) rcorded its trust deed, the leveled platform for the building and the orange and yellow flagging placed by the surveyor, were clearly observable on the property. (Findings of Fact 20, Record 582.)

19. On June 12, 1987, MICKELSON filed his Verified Third-Party Complaint herein, seeking to foreclose his mechanics lien. (Findings of Fact 21, Record 582.)

20. At the time of filing the Verified Third-Party Complaint, the Plaintiff verbally consented to granting of leave to file his Third-Party Complaint. (Letter from DIEHL's attorney, Randy Coke, Record 252.)

21. That subsequently when the nunc pro tunc order was

presented to the Court, DIEHL's attorney reaffirmed that he had consented to the leave being granted in June 1987. (Record 252.)

22. On November 25, 1987, the Court executed its Nunc Pro Tunc Order approving the filing of the Third-Party Complaint effective as of the date of filing on June 12, 1987. (Record 251.)

23. At the time of filing of the Third-Party Complaint on June 12, 1987, the only parties to the action were DIEHL and MICKELSON. All other parties were included as a result of the Third-Party Complaint. (Record 203.)

24. The matters and issues tried and considered by the Court are claims alleged as alternative claims by MICKELSON in his Third-Party Complaint claiming:

a. A valid lien on real property for labor and material furnished. The critical issue being priority of the claimed lien over the trust deed, which was foreclosed and the interest thereunder assigned to Third-Party Defendant, ZIONS. The date of commencement of construction being the dispositive issue, and Third-Party Plaintiff claiming that the commencement to do work or furnish materials as predating the date of recording of the trust deed, or

b. A right to remove personal property (which is no longer relevant herein). (Findings of Fact 23, Record 583.)

25. After a trial before the Court, the Court entered Judgment in favor of MICKELSON determining that MICKELSON's mechanics lien is a valid and legal lien, that the interests of

DIEHL and ZIONS is inferior and subordinate to MICKELSON's lien and ordering the foreclosure of said lien pursuant to §38-1-17 of UCA, 1953, as amended. (Judgment - Record 586-588.)

SUMMARY OF ARGUMENT

The Respondent's arguments are summarized as follows:

1. **Mickelson's lien foreclosure with respect to ZIONS was timely.** It is clear from the findings of the Court, that MICKELSON suspended work on the COMTEL BUILDING on June 10, 1986 (Findings of Fact 6, Record 580). Pursuant to §38-1-11, the action to foreclose a mechanics lien must COMMENCE within one year after work is suspended for a period of 30 days, or no later than July 9, 1987. The Third-Party Complaint commencing foreclosure was filed on June 12, 1987, well within the statutory filing period.

2. **Mickelson's lien foreclosure action with respect to DIEHL Lumber was timely.** §38-1-11 UCA, 1953, as amended, requires that actions to enforce the liens must be begun within 12 months after suspension of the work for a period of 30 days. The action to foreclose the lien was clearly begun within 12 months after work was suspended for 30 days. DIEHL was a party to the action, represented by counsel, had a notice of the lien foreclosure action, and defended against it. The limitation period covered by §38-1-11 only requires that the action to foreclose must be begun within the 12 month period. DIEHL was a party to the action from the beginning, raising in its own Verified Amended Complaint the fact that MICKELSON claimed an

interest in the real property by virtue of his lien (Record 008). DIEHL defended vigorously against the lien, and is bound by the Judgment of Foreclosure.

3. Mickelson's work was clearly lienable. Although MICKELSON alleged alternative theories of recovery he has testified only that part of the equipment he installed was removeable. MICKELSON testified he is a licensed electrical contractor (Record 628, p. 10, line 24), that he contracted to, and installed, all of the electrical work on the COMTEL BUILDING (Record 628, p. 14, line 18-22), that he completed the electrical work in the amount of $78,897.77, and after all payments, a balance remained of $27,026.46 (Record 628, p. 29-30, line 15-22). He continued to do work until June 10, 1986, when he suspended work for non-payment (Record 628, page 37-38), and although some of the fixtures were removeable the bulk of the electrical materials were permanently attached in the building and clearly lienable, being a permanent improvement to the building contruction.

4. The Utah Mechanics Lien statute is constitutional. It is clear under the provisions of the Utah mechanics lien statute, that even though a lien could be filed without stating an amount claimed, the clear procedural protections are afforded to the property owner. The filing of a lien does not "take" the property as do the prejudgment creditor remedies cited by the Appellant. In the case of mechanics liens, it is only a notice of lienor's claim, and in order to "take the property" a lawsuit must be filed, the owner served, and full trial on the merits be

held to protect the interests of both the owner and the lien claimant.

However the mechanics lien statute is intended to protect laborers and materialmen who enhance the value of the property. It is not made in pursuance of any express requirement of the Constitution.

The express provisions of §38-1-7(2)(e) provides that no acknowledgment or certification is required for any notice filed after April 29, 1985, and before April 24, 1989. MICKELSON's lien was filed August 26, 1986. Inasmuch as the taking of property can only occur under the Utah lien statute, only after notice, recordation thereof, filing of a lawsuit, and trial on the merits, the statute clearly affords all the protections of the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 7, of the Utah Constitution.

ARGUMENT

I. THE LIEN FORECLOSURE ACTION WITH RESPECT TO ZIONS WAS TIMELY.

Under the clear provisions of §38-1-11:

> "Actions to enforce the liens herein provided for must be BEGUN within 12 months after completion of the original contract, or the suspension of work thereunder for a period of 30 days." [Emphasis added.]

There is no evidence whatsoever that MICKELSON's contract was ever completed, but only the clear testimony of both MICKELSON (Record 419) and Larry Bradshaw, (BRADSHAW), President of HERTITAGE, (Record 423) that work had been suspended by

MICKELSON on June 10, 1986, when HERITAGE's financing failed to close as promised. Even after the last work invoiced and shown as being done on May 19, 1986, (Record 628, p. 36, line 1-10), MICKELSON received promise from HERITAGE that financing would close on June 10, 1986, (Record 628, p. 37, line 1-3). This was acknowledged by HERITAGE (Record 628, p. 160, line 6-15). MICKELSON continued to work on the project after May 19, 1986, doing various lienable work such as moving outlets, adding special outlets for a xerox machine, installing elbows and fittings on about 300 feet of underground conduit, installing cover plates, etc. (Record 628, p. 38, line 25-25). However, on June 10, 1986, when HERITAGE's financing failed to close, MICKELSON suspended work on the project (Record 628, p. 39, line 20-25 and p. 40). BRADSHAW (HERITAGE's President) also affirmed the suspension of work by MICKELSON (Record 628, p. 161, line 8-22).

Pursuant to §38-1-11, MICKELSON then had the choice to file an action to foreclose the lien one year after he suspended work for 30 days. The action had to be filed by July 9, 1987.

On June 12, 1987, MICKELSON filed his Third-Party Complaint (Record 097), first contacting DIEHL's attorney (Randy Coke), the only other party in the action at that time, and having received his (Randy Coke's) agreement that he would not oppose a Motion for Leave to file (Record 252), the Court was so infomred. However the clerk inadvertently made a minute entry that the matter was continued without date (Record 126). Thereafter ZIONS was served and filed its Answer (Record 127). Inadvertently the

Order granting leave was not submitted to the Court until November when the oversight was discovered. Inasmuch as ZIONS was not a party to the action when the Third-Party Complaint was filed, the oversight was corrected by the Court, upon MICKELSON's request, and supported by the written letter of DIEHL's counsel, Randy Coke, verifying that in June of 1987, he had agreed that he would not oppose the motion (Record 252) and the Nunc Pro Tunc Order was signed on November 25, 1987, effective as of the date of filing - June 12, 1987. (Record 251)

It is clear from the provisions of Rule 14 of the Utah Rules of Civil Procedure that:

> "... the third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action."

The Motion for Leave was filed with the Court on June 17, 1987, and the only other party to the action (DIEHL) acknowledged that in June they had agreed not to oppose the motion. Only ZIONS has ever raised the issue, and since they were not a party to the action, had no standing to challenge the Court's granting leave to amend.

Rule 60(a) makes clear that:

> "Clerical mistakes in judgments, orders or other parts of the record and error therein arising from oversight or ommission may be corrected by the Court at any time of its own initiative, or on the motion of any party and after such notice, if any, as the court orders."

The courts of this state have recognized the inherent right

of a court to enter a judgment nunc pro tunc to correct clerical errors. Frost v. District Court ex rel. Box Elder County 96 Utah 106, 83 P2d. 737 (1938).

The correction contemplated by subdivision (a) must be undertaken for the purpose of reflecting the actual intention of the Court and the parties. Lindsay v. Atkin, 680 P2d. 401 (Utah 1984).

The nunc pro tunc order was entered to correctly reflect what had been intended in June by both the parties and the Court.

The decisive issue as to the timeliness of the lien rests not when work was last done, but when MICKELSON suspended work.

In the recent case of Mickelson v. Craigco, Inc., 767 P2d. 561 (Utah 1989), the Supreme Court rejected appellant's reasoning that a lien claimant must bring action within 12 months after suspension of "ANY WORK", concluding:

> "We do not subscribe to the trial court's interpretation of §38-1-11 because it runs contrary to this court's decision in Totorica v. Thomas, 16 Utah 2d 175, 397 P2d 984 (1965). In that case we interpreted the literal conjunctive language of the statute "that the action must be commenced within twelve months after the completion of the original contract OR the suspension of work thereunder for a period of thirty days" as affording the lien claimant a choice. That is to say "a lien claimant may bring an action within twelve months after the completion of his contract, or if he wishes, bring it within twelve months after there has been a suspension of work for a period of thirty days."

MICKELSON's commencement of action was clearly timely, the Third-Party Defendant, ZIONS, was served and answered before the one year and 30 day period had expired. Whatever interest ZIONS

acquired at the Trustee's Sale was subordinate to MICKELSON's lien.

Appellant has incorrectly reasoned that the 12 month period for filing of the action must run from the last date of work as stated in the lien. That reasoning is clearly erroneous. The Supreme Court in Mickelson v. Craigco, Inc., supra, concluded that by the choice of the lien claimant he may elect to bring the action within 12 months after there has been a suspension of work for a period of 30 days.

Even if the rationale of Appellant were accepted and June 2nd or 3rd, 1986, was the date of suspension of work, 30 days suspension period expires July 1st or 2nd, and 12 months thereafter, the foreclosure action was already commenced.

MICKELSON continued to provide labor and materials and fully intended to complete the contract until June 10, 1986, when work was suspended. It is clear that the work MICKELSON was performing was lienable work, within the meaning of UCA, 1953, as amended, §38-1-3, which states:

> "Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner ... shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or funished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise."

In the case of Rotta v. Hawk, 756 P2d. 713 (Utah App. 1988),

the Court of Appeals concluded:

> "The purpose of the mechanics lien act is remedial in nature and seeks to provide protection to laborers and materialmen who have added directly to the value of the property of another by their materials or labor." Calder Bros. Co. v. Anderson, 657 P2d 922, 924 (Utah 1982). For work to add to the value of property, it is necessary that the work benefit the specific property in question."

It appears from the testimony of both MICKELSON (T. 38, 91) and HERITAGE, that MICKELSON continued to do the work requested by HERITAGE or COMTEL, but authorized by HERITAGE (T.91 line 4) (T. 147-148). Appellant has argued that MICKELSON's suspension of work on June 10, 1986, was not a "suspension" because he did not return to work later (Appellant's Brief p. 18-19). However, it is clear from the undisputed testimony of both MICKELSON (T. ___) and the owner/general contractor, HERITAGE (T. 161, line 20-22), that MICKELSON suspended work with the statement he would do no more work on the job "unless I get some money". (T. 161, line 22)

Black's Law Dictionary defines "suspend" as:

> "to interrupt, to cause to cease for a time...
> also, sometimes, to discontinue or dispense with (permanently)..."

At the time of suspension of work on June 10, 1986, MICKELSON made clear that his suspension was until he got paid for what was owed to him, so he could pay his suppliers. Inferentially, had HERITAGE paid him, MICKELSON would have returned to the job to complete the work. The evidence of that suspension was undisputed.

Even if the suspension date of June 10, 1986, was not correct, as Appellant argues, and the 30 days plus 12 month period ran from May 15, 1986, the action was still filed timely on June 12, 1987.

Appellant raised the same claims before the trial court on two different motions for summary judgment and at trial, and the findings of the trial court were supported by substantial competent evidence that the suit to foreclose the mechanics lien was brought in time, and should not be disturbed on appeal. Wilcox v. Cloward, 88 Utah 503, 56 P2d. 1 (1936).

II. MICKELSON'S FORCLOSURE ACTION AGAINST DIEHL LUMBER WAS TIMELY.

The same arguments of Point I heretofore, apply to DIEHL also. The only difference in ZIONS and DIEHL's position is that DIEHL was a party to the action from its inception, whereas ZIONS was added as a party through the Third-Party Complaint (Record 97)

The statute applicable to this point is §38-1-11 wherein it is provided:

> "actions to enforce the liens... must be begun within 12 months after completion of the original contract OR the suspension of work thereunder for a period of 30 days.
> ...within the twelve months herein mentioned the lien claimant shall file fore record...notice of the pendency of the action ... or the lien shall be void EXCEPT as to persons who have been made parties to the action AND PERSONS HAVING ACTUAL KNOWLEDGE OF THE COMMENCEMENT OF THE ACTION..." [Emphasis added.]

Not only has DIEHL had actual knowledge of Defendant's lien claim, but in DIEHL's own Complaint filed October 1986 (Record 2,

paragraph 4), it was alleged by DIEHL, that MICKELSON claims an interest in the property by virtue of a mechanics lien filed thereon. That allegation was admitted in MICKELSON's Answer and put at issue thereby.

Upon filing the Third-Party Complaint (Record 97) and serving ZIONS, ZIONS thereafter filed a motion for summary judgment to dismiss the lien foreclossure (Record 164), and DIEHL's attorney, Randy Coke, was present and joined in the motion (Record 279, 328).

Thereafter counsel for ZIONS has also represented DIEHL as well as ZIONS and in all subsequent motions and the trial, has vigorously defended the position of both ZIONS and DIEHL.

On January 26, 1988, MICKELSON filed a Motion for Leave to Amend Counterclaim (Record 312) for the specific purpose to "conform the counterclaim to the issues raised", to include DIEHL as an interested party and not to commence foreclosure action. (Record 312)

The foreclosure action had already commenced on June 12, 1987 within the statutory period, the parties had been vigoroulsy contesting the foreclosure action, and the amendment was solely to clarify the record. Leave was granted in the sound discretion of the Court (Record 331). In the case of Buehner Block Co. v. Glegos, 6 Ut 2d 226, 310 P2d. 517 (1957) the Supreme Court stated at page 229:

> "notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principal that under our system of justice, if an issue is to be tried, and a party's rights to be concluded with respect

thereto, he must have notice thereof and an opportunity to meet it."

Appellant has again cited four cases (Appellant's Brief, p. 23) as authority that DIEHL should be dismissed. However in each of these cases the trial was concluded without the owner of record being included as a party.

Appellant loses sight of the very fact they argue, ie. that a lien foreclosure action is an action against the property, an action in rem, not directed against people. (Appellant's Brief, p. 16) It is that very reason why §38-1-11 requires only that the foreclosure "ACTIONS must be begun..." within the statutory period. Once the action has begun, individual parties must be brought in only if their rights are to be concluded. Buehner Block Co. v. Glegos, supra. The foreclosure action could proceed, but it simply could not conclude an individual's rights therein unless the individual has notice and opportunity to defend. Nothing in §38-1-11 requires that every individual must be named within the 12 month period. Accordingly the timeliness of the action depends only on when the foreclosure action is BEGUN. MICKELSON's lien action against the property is valid, and both DIEHL and ZIONS had notice and the opportunity to meet and defend their rights.

III. MICKELSON'S WORK WAS LIENABLE.

§38-1-3 UCA, 1953, as amended, gives a lien right to any person performing any services or furnishing or renting any materials or equipment used in the construction, alteration or improvement of any building or structure or improvement to any

premises in any manner.

Without dispute, MICKELSON provided labor and mateials for all of the electrical work on the COMTEL BUILDING, in the amount of $78,897.77 for which payment was made in the sum of $51,871.31, leaving a balance due and owing of $27,026.46.

Appellants have apparently chosen not to appeal regarding the determination by the Court:

> "8. That the work performed on January 16, 1985, by Bay Construction satisfied the requirement of the statute §38-1-5, UCA, 1953, as amended, as being the "commencement to do work or furnish materials on the ground for the structure or improvement." (Record 584)

The determination of whether work is lienable has been reviewed several times recently by this court. In the June 1986, case of Rotta v. Hawk, supra, this court was faced with a situation in which the contractor had two parcels of land on which to build. The evidence showed that he "removed" fill dirt from one lot to fill the other and then claimed that the removal of the dirt was lienable work. This court rejected the contractor's claim finding that the work on the lot from which dirt was removed did not benefit that lot and in fact acutally created a liability, requiring replacement of fill before construction could proceed. However the Court also concluded:

> "For work to add to the value of property, it is necessary that the work benefit the specific property in question. The work performed on Parcels A and B (from which the fill dirt was removed) would constitute an improvement, had it been done with the intent and purpose of benefiting the second project (Parcel A and B) from which fill was removed." [Parenthesis added.]

There is absolutely no evidence contrary to the evidence that all of MICKELSON's work benefited the property. Appellant argues that because MICKELSON plead an alternative theory of replevin, that makes the improvements not lienable. (Appellant's Brief, p. 24-25) The Court rejected that claim and held that MICKELSON's:

> "...title retaining agreement does not satisfy the requirements of the statute and no valid security interest was created by the same..."

Even Defendant, DIEHL, argued to the Court that the "installations are fixtures under Utah law". (Record 35 and 37)

In Bailey v. Call, 767 P2d. 138 (Utah App 1989), this Court concluded:

> "The mechanics lien statute is intended and designed to prevent the owners of land from taking the benefits of improvements placed on his property without paying for the labor and materials that went into them. Frehner v. Morton, 18 Utah 2d 422, 424, P2d 466, 447 (1967). The statute is to protect laborers and materialmen who enhance the value of property, and to effectuate that purpose, we construe the statute broadly. Interiors Contracting, Inc. v. Navalco, 648, P2d, 1382, 1386 (Utah 1982)."

This Court then discussed and concluded that whether the work is authorized by the owner, or an agent of the owner, so long as it "enhances the value of the property", it is lienable. (Bailey v. Call, supra.) At no time has any evidence been presented to the trial court to question the fact that MICKELSON's labor and materials enhanced the value of the property, and in fact the building would be unuseable without it.

The standard of review for findings of fact entered by a

trial court in a non-jury proceeding is set forth in Utah Rules of Civil Procedure, Rule 52(a) which provides in part as follows:

> "Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

MICKELSON's labor and materials enhanced the value of the property, were lienable, and the determination of the trial court should be affirmed.

IV. THE UTAH MECHANICS LIEN STATUTE IS CONSTITUTIONAL.

Appellant claims the Utah Mechanics Lien Statute is unconstitutional and to support that claim sets forth cases dealing with prejudgment remedies in which one's property is acutally taken. It is submitted that the question should address only the questions of:

1) Does the filing of a "Notice of Lien" result in the "taking of property", and

2) If so, does the Utah Mechanics Lien Statute provide the necessary constitutional safeguards.

The cases cited by Appellant and dealing with prejudgment remedies are totally distinguishable and not applicable to filing of a lien notice. In the case of Rio Grande Lumber v. Darke, 50 Ut 114, 167 P241, 1918 ALRA 1193 (1917), the Supreme Court stated that the Utah Mechanics Lien Law is not made in pursuance of any express requirement of the Constitution; but the law is nevertheless constitutional because the Constitution does not prohibit it.

Appellant has argued that even though MICKELSON's lien was "subscribed and sworn to," nevertheless the statute is unconstitutional because it did not specifically require the same. These requirements do not involve constitutional questions because the "owner" consents to the lien.

A mechanics lien is purely a statutory lien and can only be imposed upon the owner's property where the owner, either in person or by his agent, CONSENTED to the work being done. (Bailey v. Call, supra.) Thus, the lien becomes a security for the payment for labor and materials, 53 Am Jur. 2d, Mechanics Liens §3) previously consented to by the owner (by authorizing the work to be done), a right to sell the property to which the lien attaches if the debt is not paid. It is clear in this case, HERITAGE was the owner/general contractor of the building (Record 206) and consented to and contracted for MICKELSON to do the electrical work completed (Record 140-141). By the owner's consent to have the work performed, the subcontractor, MICKELSON was given a security right in the property, ie. a right to sell the property if the debt is not paid.

Costanzo v. Stewart, 9 Ariz. App. 43, 453 P2d 526 (1969), Nolte v. Smith, 189 Calif. App. 2d 140, 11 Cal. Rptr. 261, 87 ALR 2d 996, United Pacific Ins. Co. v. Martin & Luther General Contractors, 455 P2d 664 (Wyo. 1969).

Accordingly, an owner having consented to the security (lien) cannot be deemed to have his property "taken", by the very act to which he consented.

In a large majority of jurisdictions the courts have

determined that filing of a lien against real property does not constitute taking of significant property interests from either the property owner or the construction lender in violation of Fourtheenth Amendment due process. Bankers Trust v. El Paso Pre-Cast Co., 560 P2d 457 (Colo. 1977).

Moreover the courts have held that the procedures serve the interests of prospective purchases of the property by providing them notice of potential claims against the property much like a lis pendens, which does not constitute "taking" subject to due process.

The more sound reasoning concludes that even if filing of a lien creates an interest in real property, it does not unconstitutionally deprive owner of his property without due process of law, because filing of a mechanics lien does not result in the deprivation of any significant property interest, in that filing of a lien does not prevent owners from selling, encumbering, renting, or otherwise dealing with the property as he chooses.

Carl A. Morse, Inc. (Diesel Constr. Div.) v. Rentar Industrial Development Corp., 56 A 2d 30, 391 NYS 2d 425 (1977); Red River Valley National Bank v. Craig, 181 US 548, 45 L Ed 994, 21 S. Ct. 703; Drake Lumber Co. v. Paget Mortgage Co., 203 OR 66, 274 P2d 804, (1954).

The filing of a notice of lien is not a "taking" of property in violation of the constitutional due process provisions. It is solely a notice to those interested in the property, which, prior to foreclosure of said lien, must be fully reviewed by the courts

in the foreclosure action. If said action is not begun within the statutory period, said lien is deemed void (§38-1-11, UCA 1953, as amended).

CONCLUSION

Based upon the foregoing, the Findings of Fact entered by Judge Sawaya are supported by substantial competent evidence, and should not be disturbed (Bailey v. Call, supra) on appeal. Based upon those Findings of Fact, the trial court properly granted judgment allowing MICKELSON the right to foreclose his Mechanics Lien against the real property to allow him to recover for his unpaid labor and materials provided in the improvement and construction of said property, otherwise the owner would realize a "windfall" for the unpaid labor and materials. The trial courts decision should be affirmed.

Inasmuch as the Mechanics Lien Law allows the lien claimant a reasonable attorney's fee, the Respondent prays also for additional attorney's fees and his costs as allowed under Rule 34, of the Rules of the Utah Court of Appeals.

Respectfully submitted this 14th day of September, 1989.

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M. RICHARD WALKER & ASSOC.
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MAILING CERTIFICATE

The undersigned hereby certifies that two true and correct copies of Respondent's Brief were mailed, postage prepaid, on the 14th day of September, 1989, to:

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